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SUBJECT:

19 July 1988

NOTE TO: EA/DCI

FROM: EA/DDI

SUBJECT: Background Paper on Legal Impact of Islamic
Reforms in Pakistan

The attached paper from the Office of Near Eastern and South Asian Analysis (NESA) responds to the DCI's request for further information on the effect that President Zia's imposition of shariah will have on Pakistan's legal system. As NESA's paper indicates, most of the specific impact of Zia's action has yet to be determined. There are several schools of Islamic jurisprudence and thus several directions that the Islamization program could take.

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Background Paper for the DCI

19 July 1988

Pakistan: Legal Impact of Shariah Reforms

President Zia's recent Islamization ordinance is designed to replace Pakistan's western based legal system with an Islamic system based on Shariah law. Pakistani law presently is an uneasy mix of western law to which Islamic reforms, mainly of criminal law, have been grafted. Zia has asserted that his reforms are intended to purge Pakistan of "the dross of non-Islamic values." In essence, Pakistan's western judicial code and constitution is a mix of rights and obligations. Classic Islamic law is a facet of Islam which lays down rules of behavior for believers. Therefore, it is centered upon the idea of man's obligations and duties rather than his rights.

The dimensions of Zia's reforms are unclear and have created great uncertainty within Pakistan.

- There are five recognized schools of Islamic jurisprudence; four are Sunni and one is Shia. The Fiqh Hanifa is the Sunni school that is probably closest to Zia's beliefs. The Fiqh Jafria is the school followed by Shias who make up about 20 percent of Pakistan's population. It is unclear which of the five schools would be adopted or if the judges would be free to choose a school or pick and choose among them.
- The schools hold contradictory views on many potentially important issues. For example, Sunni jurisprudence requires mandatory charitable contributions, called Zakat. Shia jurisprudence makes Zakat voluntary. Intense Shia opposition to Zia's 1980 Zakat Ordinance that adopted the Sunni view of mandatory contributions forced the President to recognize the position of both schools on this issue.
- In general, the Shia Fiqh Jafria permits a judge more latitude in creating and modifying legal precedents. The four Sunni schools traditionally hold that the concept of Ijtihad (creation of new legal precedents based on the Koran and Sunnah--the latter are legal rulings by the Prophet Mohamed and those of his immediate successors) was replaced during the 10th century AD by Taqlid (adherence to recognized precedents).
- The Chief Justice of Pakistan's Federal Shariat Court has asserted that the Court is merely guided by the interpretations of the five

Islamic schools. The Chief Justice declared in 1986 that classic Islamic precedents could be rejected by the Court if the departure does not contravene the clear command of the Koran or Sunnah. [REDACTED]

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Impact of the 1979 Reforms

Zia's 1988 Shariah Ordinance is only his latest attempt to reform Pakistan's law along Islamic lines. In addition to the 1980 Zakat Ordinance, Zia in 1979 proclaimed the Hudood Ordinances. These ordinances replaced Pakistan's western law in four broad areas: sex crimes, narcotics abuse (both of alcohol and drugs), crimes against property (i.e. theft) and false witness (i.e. the commission of perjury in filing a Shariat charge). Trials under the Hudood Ordinances are conducted by District judges who are not required to be trained in Islamic law. There is no provision for trial by jury. At the same time Zia decreed Hudood crimes, he created the Federal Shariat Court as an appellate court for Hudood cases. Zia also added a Shariat Bench to Pakistan's Supreme Court and made the latter the final court of appeal. The Shariat Bench consists of three Supreme Court justices and two Islamic legal experts. [REDACTED]

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The Ordinances recognize a distinction between "Hadd" crimes which are expressly defined in the Quran and Sunnah (ex. adultery, theft) and "Tazir" crimes. The latter are less severe crimes under the same general category or Hadd offenses in which the evidentiary requirements to sustain a Hadd sentence can not be satisfied. Hadd crimes are subject to more severe punishments than are Tazir crimes. Thus, adultery requires four pious adult male witnesses to the act and the confession of the accused which may be recanted at any time. Theft requires two adult male witnesses to a theft of property worth more than 4.457 grams of gold. If these evidentiary requirements are satisfied, the penalty for adultery is death by stoning. For theft it is amputation of the right hand. (Sunni schools generally recognize amputation to the wrist, Shia Fiqh Jafria the fingers or a portion of them). If the Hadd evidentiary requirements can not be met, the judge tries the case under Tazir. He can not award the Hadd penalties for a Tazir offense but may set lesser penalties, including imprisonment, fines, and/or flogging. [REDACTED]

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Some Pakistani trial courts have convicted defendants under Hadd sanctions but the Federal Shariat Court has never upheld a Hadd sentence. The Justices have always found the trial judge in error for failing to adhere to the evidentiary requirements and have remanded the cases for retrial under Tazir. The Federal Shariat Court has sustained Tazir sentences but, according to one academic, has usually reduced the sentence imposed. [REDACTED]

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[REDACTED]

The Hudood Ordinances have effectively created three categories of Pakistani citizens, male Muslims, female Muslims, and non-Muslims in descending order of legal importance. They are binding on all Pakistani citizens regardless of religion, but the Federal Shariat Court has ruled that only Muslims may argue cases and only Muslims may serve as Shariat judges. Women's testimony is either excluded, as in theft cases, or downgraded, usually with the testimony of two women being equal to that of one man. We believe that taken to its logical conclusion, full implementation of Shariah law in Pakistan will exclude women and religious minorities from the legal profession and the judiciary. [REDACTED]

Impact of the 1988 Ordinance

The 1988 Ordinance does not abolish Pakistan's pre-existing western judicial system. Rather, "Muftis" trained in Islamic jurisprudence are to be appointed to assist the appellate courts in interpreting the law to bring it into conformity with Islamic precepts. Muftis can also be appointed as trial judges but only the appellate courts will have the authority to strike down a law as un-Islamic. We believe that Zia envisions the gradual replacement of Pakistan's western law with Shariah law. He probably hopes to eventually abolish the western judicial system. [REDACTED]

The impact of Zia's 1988 Shariah Ordinance on women is unclear. At the least, it provides a legal basis for challenging the validity of the 1961 Family Laws Ordinance. Arguably, the 1961 Ordinance's restrictions on divorce and polygamy, and its provisions for adoption and inheritance are un-Islamic. Traditional interpretations of Islamic law:

- permit a man to divorce his wife by repeating "I divorce you" three times,
- permit a man to have four wives without the consent of his wife or wives,
- do not recognize the concept of adoption,
- and limit the distribution of an estate in inheritance cases.

Some Pakistani women activists assert that passages can be found in the Koran and Sunnah that would justify barring women from holding political office--an interpretation that would effectively bar Zia's main political opponent Benazir Bhutto from political life. [REDACTED]

Also unclear is the impact of the 1988 Ordinance on banking and financial laws. The Ordinance mandates a committee of economists, jurists, and Islamic scholars to recommend reforms by July 1989. It probably

empowers the western appellate courts rather than the Federal Shariat Court to determine if Pakistan fiscal, taxation, and banking laws are Islamic. The Ordinance also requires existing financial contracts and obligations made by the government to be honored. [redacted] however, that the business community is concerned that Islamic law could be applied to disadvantage creditors. Bankers have told US diplomats that Abu Dhabi has used Islamic prohibitions against interest to protect defaulting debtors from paying penalties. [redacted]

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Outlook

The impact of Zia's latest Islamic reforms is likely to be gradual and uncertain. Zia did not abolish the pre-existing judiciary. He left it to determine what laws are un-Islamic and made the role of the Mufti advisory. We speculate that a judiciary trained in western law and, US diplomats report, basically uncomfortable with Shariah law is likely to resist radical change. Modifications are likely to be made on a case by case basis. Like the Chief Justice of the Federal Shariat Court, the secular judges will probably assert they have the power to construe the requirements of the Koran and Sunnah rather than being bound by the precedents of the five main schools of jurisprudence. Except where the Koran or Sunnah clearly limits their flexibility, they will probably look for Islamic analogies to existing western legal concepts in Pakistan's laws. [redacted]

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SUBJECT: Background Paper for the DCI
Pakistan: Legal Impact of Shariah Reforms

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DDI/NESA/SO (19 July 1988)

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23 June 1988

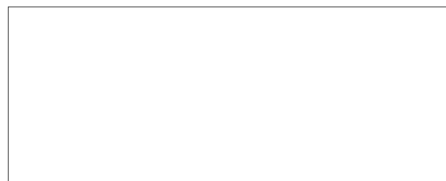
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NOTE TO: ~~EA/DDCI~~

FROM: EA/DDI

SUBJECT: Implications of Zia's Islamization Program

The Office of Near Eastern and South Asian Analysis has prepared the attached material on the implications of President Zia's recent mandating of Islamic reform of Pakistan's legal system. The material responds to the DCI's request for an analysis of the subject, which was raised at last week's meeting at State. The DDCI may also wish to use the material for his next regular meeting at State.



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This still doesn't say what the differences are.

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--Differing interpretations and a dearth of Islamically trained judges could lead to additional delays in an already inefficient judicial system.

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--The Shia community--roughly 20 percent of Pakistan's population--views Zia's ordinance as an attempt by the Sunni majority to enforce Sunni doctrine.

--Arif al-Hussaini, President of the radical Shia Tehrik e Nifaz Jaferia party, has denounced the ordinance, claiming that Zia has no right to impose his views arbitrarily and that any binding Islamic legislation should first be passed by parliament.

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Mainstream politicians and groups view the ordinance as a step backward for Pakistan.

--The Punjab wing of the Pakistan People's Party--the largest opposition party in Pakistan--has demanded that Zia suspend the ordinance.

--The General Secretary of the Jamaat Islami Party--a religious party closely associated with Zia--has said that Zia's Islamization is purely cosmetic and that his party will resist any efforts by the President to "work against democracy in the name of Islam."

--Women's rights advocates are concerned that Islamization will permit fundamentalists to overturn laws protecting women in divorce and inheritance actions.

--The Director General of Military Intelligence at Pakistani Army General Headquarters says that Islamization is becoming an increasingly divisive issue and could cause problems within the Army

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It is unlikely that any of the political parties opposed to Zia will win enough seats in the National Assembly to thwart his Islamization ordinance. Moreover, any parliamentarian opposing the ordinance would be open to charges that he is anti-Islamic.

--By dismissing the Junejo government and dissolving the National Assembly, Zia has demonstrated that he still wields the political power in Pakistan.

--We believe that few politicians--acutely aware of the example of Junejo--will risk retribution by challenging Zia on Islamization.

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The implementation and interpretation of the presidential ordinance will likely bog down Pakistan's already cumbersome legal system. There are several schools of Islamic jurisprudence, and there is no judicial consensus over which one should be the wellspring of court rulings.

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Zia's Islamization Program

On 15 June President Zia promulgated a presidential ordinance that mandates Islamic reforms for Pakistan's Western-based legal system, including making Shariah law the supreme law of the land, and appointing religious scholars (Ulema) as advisers to all levels of the judiciary.

--Under Pakistan's Constitution, the ordinance carries the full force of law for only four months. Nothing in the Constitution, however, precludes Zia from reissuing the ordinance as long as either the National Assembly or the Senate is not in session.

--A presidential ordinance must be approved by both houses of parliament to be permanently ratified into law. The Senate, which was not dissolved by Zia, is scheduled to consider the ordinance in early July, according to press reports. The National Assembly--once it is convened--has no constitutional time limit in which it must consider the ordinance.

--Similar legislation had been stalled in the National Assembly for more than two years because legislators believed that the Federal Shariat Court could use its expanded powers to exert control over parliament.

--The ordinance makes all laws--including once-exempted family and inheritance laws--subject to Islamic tenets. Senior appellate courts, not just the Federal Shariat Court, are now tasked with interpreting and enforcing Sharia law.

A commission is now being established to provide recommendations to the government to help in molding the economy along Islamic lines. Another commission is also being set up to transform Pakistan's education system into one based upon Islamic teachings.

--The reforms mandated by the ordinance, however, will not affect already settled investment matters or dealings with foreign countries or international organizations.

Resistance to Islamization

The Islamization ordinance is a potentially explosive measure because there is no national consensus on which interpretation of Islam to follow--Shia or Sunni.

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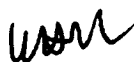
20 June 1988

MEMORANDUM FOR: DDI

FROM: Director of Central Intelligence

SUBJECT: Pakistan

1. With Zia's current commitment to establishment of Islamic Law in Pakistan, my attention is again directed to what changes in the legal structure this implies. Can you give me a note on this?



William H. Webster

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